

Mr. Norman Jung

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September 9, 1993

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State of California

Board of Equalization
Legal Division**Memorandum****CONFIDENTIAL: ATTORNEY-CLIENT PRIVILEGE**

To: Mr. Norman Jung
GH - Supervising Tax Auditor

Date: September 9, 1993

From: John L. Waid
Tax Counsel

Subject: SR GH REDACTED TEXT
Excess Tax Reimbursement

I am responding to your memorandum of May 19, 1993, to the Legal Division. You indicate that the taxpayer ("REDACTED TEXT") has filed a timely claim for refund for sales taxes paid on sales of food to students through a vending machine. Affixed to the machine is the tax-included statement mandated by Civil Code Section 1656.1(b)(1). During REDACTED TEXT's audit it was determined that approximately 95% of its sales through this machine were qualified exempt sales.

OPINION

You indicate that your audit review section has two concerns regarding REDACTED TEXT's Claim for Refund. I will discuss these in the order you raise them.

1. "Does this tax-included statement create an excess tax reimbursement situation for all exempt sales because all customers were notified that sales tax was included in the purchase price of the product. Regulation 1700(b)(1) states 'When an amount represented by a person to a customer as constituting reimbursement for sales tax is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the person, the amount so paid is excess tax reimbursement.'"

The regulation is very clear on this point: "Excess tax reimbursement is charged when reimbursement is computed on a transaction which is not subject to tax...." (Ibid.) REDACTED TEXT included tax reimbursement in the selling price of all of the tangible personal property at issue, a large proportion of which were exempt from tax, and even paid tax on those sales. You indicate that the auditor does not think there is excess tax reimbursement on the theory that the taxpayer's intent was to notify its customers to whom taxable sales were made that sales was included in the price. The auditor relies on the presumption in Regulation 1700(a)(2)(C) that the gross receipts from sales of items subject to

the sales tax is sold at a price which includes tax reimbursement if the tax-included statement at issue is posted in the retailer's premises. He concludes that where the sale was not subject to tax, the regulation resumes that reimbursement was not included in the sale price.

We agree. While an argument can be made that the items as they sit in the vending machine are taxable and that their sales only become exempt if sold to the proper person, the better view, if only for the sake of administrative convenience is, to rely on the presumption stated above. Thus, we conclude that the tax-included statement sets up a presumption that reimbursement is included on only taxable sales. Exempt sales, though for the same price, do not include tax reimbursement. As a result, REDACTED TEXT is selling to students for one price and to non-students for a lesser price plus tax reimbursement. Since REDACTED TEXT collected no tax reimbursement, it may obtain a refund of the taxes it paid.

JLW:es

bc: San Jose District Administrator